Supreme Court, U.S.
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No. 92-1155

IN THE

Supreme Court of the United States

October Term, 1992

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and Individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and Individually,

Petitioners,

v.

ROBERT L. MILLER, and MARK R. MCCAMMON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

I. Because the state statute at issue has been replaced, a review of the interpretation of it made by the Court of Appeals would be of minimal importance.

II. The issue in this case was correctly decided below. Petitioners' chief argument is based upon a faulty analysis of case precedent.

ARGUMENT

I. THE ISSUE PRESENTED IS OF NO GENERAL IMPORTANCE.

The issue in this case is whether or not *Indiana Code* 28-1-2-15 gave certain employees a protectible property interest in their continued employment.

Indiana Code 28-1-2-15 was replaced in 1991 by *Indiana Code* 28-11-2-5. Petitioners have argued that the current statute is a change in the law; Respondents believe it is a clarification.

In either case, the new law applies to current employees of the Department of Financial Institutions. Interpretation of the former statute is likely to affect only these parties.

II. THE ISSUE WAS CORRECTLY DECIDED BELOW.

Petitioners rely heavily on the holding of *Phegley v. Indiana Department of Highways,* 564 N.E. 2d 291 (Ind. App., 1990). The statute at issue in *Phegley,* however, differs distinctly from *Indiana Code* 28-1-2-15.

In *Phegley,* the court interpreted *Indiana Code* 8-9.5-4-4. The relevant portion of this statute is as follows:

> (2) cause for demotion, dismissal, discipline, or transfer may include *but is not limited to* failure to satisfactorily effectuate the department's transportation and work programs.

(emphasis added).

By including the language italicized above, the Indiana General Assembly specifically avoided the operation of the legal maxim, "Expressio unius est exclusio alterius." Further, it may fairly be inferred that the legislature understands the operation of this maxim, and is capable of drafting statutory language to avoid it.

The critical language of *Indiana Code* 28-1-2-15 was its last sentence, which read as follows:

> Any of the supervisors, examiners, assistants or employees assigned to or employed in any division of the department may be removed, at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

The absence of non-limitation language in this statute clearly distinguishes it from the statute interpreted in *Phegley, supra.* Rather, the statute at issue here is more similar to Hammond Ordinance 35-10 which was at issue in *Smulski v. Conley,* 435 F.Supp. 770 (N.D. Ind., 1977).

The relevant language of this ordinance was as follows:

> The board of public works and safety may suspend a policeman without pay, not to exceed thirty days or demote or reduce him in rank for the violation of the written rules and regulations adopted by the board of public works and safety or issued by the police chief.

Smulski, supra, at 773.

The *Smulski* court reasoned that "There would be little sense in setting forth reasons for demotion if the Board of Public Works could choose a reason not enumerated on which to base its determination to take disciplinary action." *Id.,* pp. 773-4.

This reasoning applies equally to *Indiana Code* 28-1-2-15. In fact, the statute and ordinance are of nearly identical construction: [Authority] may [deprivational act] the employee for [brief list of specific reasons].

CONCLUSION

Respondents submit that no special reason exists for granting certiorari in this case. The state statute at issue is no longer in effect, and the interpretation made below was correct. Respondents therefore pray that certiorari not be granted.

Respectfully submitted,
PETER D. MILLER
Attorney for Respondents.